

## REMARKS

### I. Status of Claims

Claims 1-64, 70, 75, and 77 were previously cancelled.

Without prejudice or disclaimer, claim 73 has been cancelled, claims 65, 66, 71, 72, 74, 78-94, 97-99, 102-107, 111-113, 137, 138, and 143-147 have been amended. Support for those amendments can be found in claims as originally filed. No new matter is added herein.

Claims 137-146 are withdrawn from consideration as allegedly being directed to a non-elected invention.

Claims 65-69, 71, 72, 74, 76, 78-147 are pending with entry of this amendment.

Applicants appreciate the Office's indication that claim 89, previously withdrawn, is examined in this Office Action, and this Office Action is non-final.

### II. Information Disclosure Statement

Applicants respectfully request that the Office consider and initial reference nos. 222, 230, 231, and 236 on the SB/08 submitted on March 10, 2009, which are in English and were submitted to the Office as indicated by the attached electronic filing acknowledgement. Reference nos. 222, 230, 231, and 236 correspond to item nos. 38, 30, 29, and 24 on the attached electronic filing acknowledgement, respectively.

### III. Claim Rejections - 35 U.S.C. §112 (1<sup>st</sup> Paragraph)

Claims 65-69, 71-74, 76, 78-136, and 147 are rejected under 35 U.S.C. §112, first paragraph, as allegedly failing to comply with the written description requirement. Office Action at 3-5. Specifically, the Office states that "written description support is

lacking for the requirement that the lip makeup composition definitely HAVE a resistive index of greater than 80%", as recited in the currently pending claims, and the specification and original claims "only support that the lip makeup composition is *capable of forming a deposit that has a resistive index of greater than or equal to 80%.*" Applicants respectfully disagree and traverse for the following reasons.

The standard for determining compliance with the written description requirement is "does the description clearly allow persons of ordinary skill in the art to recognize that he or she invented what is claimed", as indicated by MPEP 2163.02. Moreover, "[m]ere rephrasing of a passage does not constitute new matter." See MPEP 2163.07 I. In addition, "[c]laims are not to be read in a vacuum, and limitations therein are to be interpreted in light of the specification in giving them their 'broadest reasonable interpretation'." 710 F.2d at 802, 218 USPQ at 292 (quoting *In re Okuzawa*, 537 F.2d 545, 548, 190 USPQ 464, 466 (CCPA 1976)) (emphasis in original).

The claims as originally filed recite that "the said composition is capable of forming a deposit that has a resistive index of greater than or equal to 80%." The specification as filed describe the steps of how to measure the resistive index, which comprises, among other steps, applying and spreading the composition onto a support to obtain a deposit of 15 um, then drying the deposit for 10 minutes. See specification at pages 4-6. That deposit can be described in terms of its properties. Similarly, the composition, giving rise to the deposit, can be described in those terms. The current claim language therefore merely rephrases the language of the originally filed claims. As such, the rejection should be withdrawn.

In addition, the Office states that support can not be found for amended claims 79-82, 84, 85, 87, 88, 90, and 91. See Office Action at 5. Applicants respectfully disagree and traverse this rejection for the following reasons.

Support can be found in original claims 12, 13, 15, 17, and 19, corresponding to current claims 79 and 80, 81 and 82, 84 and 85, 87 and 88, and 90-91, respectively, as well as specifications as filed at page 26, lines 14-21, and at page 30, lines 16-28. All of those original claims recite "the proportion of the....block...ranges from...to...by weight of the polymer". Furthermore, it is clear to one skilled artisan that "the polymer" as recited in those original claims refers to the block ethylenic polymer, *see* specification as originally filed, for example, at page 2, lines 11-17, and at page 25, lines 27-28. Applicants respectfully request that the rejection be withdrawn.

**IV. Claim Rejections - 35 U.S.C. §103**

Claims 65-69, 71-74, 76, 78-136, and 147 are rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over Anton in view of Frechet (U.S. Patent No. 6,663,855) and Melchioris (U.S. Application Publication No. 2002/0151638) as set forth at pages 6-18 of the Office Action. Applicants respectfully disagree and traverse.

The instant claims, as amended, recite, *inter alia*, a linear block polymer having "a polydispersity index of greater than or equal to 2.5 " and comprising "a first block and a second block, wherein the first block and the second block are connected together via an intermediate block comprising at least one constituent monomer of the first block and at least one constituent monomer of the second block, wherein the at least one constituent monomer of the first block differs from the at least one constituent monomer of the second block, said intermediate block is a random copolymer block with a T<sub>g</sub> that

ranges from the glass transition temperature of the first block to the glass transition temperature of the second block".

### **Anton**

Anton describes a polymer comprising a first repeat unit (first monomer) and a second repeat unit (second monomer). Anton discloses that the polymer may be a block copolymer, without, however, further discussing any particulars regarding the nature of the block copolymer. Although some of the copolymers listed in the table in col. 4, for example, the copolymers in line 50, IBBBBBBBBBB, and line 58, IBBBBBBBBBBBBBBBBMM, can be considered as linear block polymers, those linear block polymers differ from the instantly claimed block polymers. For example, the intermediate segment of the claimed block polymers is a random copolymer, whereas the intermediate segment of Anton's block polymers is either nonexistent (for IBBBBBBBBBB) or a homopolymer BBBBB (for IBBBBBBBBBBBBBBBBMM). One may argue that IBBB can be considered as the intermediate block for IBBBBBBBBB (by definition, IBBBBBBB is a diblock with no intermediate block), IBBB still is not a random block.

Furthermore, though describing that the monomer suitable for the first repeat unit is chosen from those, if polymerized, would yield a polymer with Tg varying from -10 to 75°C, and that the monomer suitable for second repeat unit, with Tg varying from 76 to 120 °C, *see* Abstract, Anton does not expressly discuss the Tg for any blocks, if any. Moreover, all of the blocks of Anton's block polymers as listed in the table in col. 4 have a glass transition temperature of over 40 °C. For example, the block polymers in line 50, IBBBBBBBBBB and line 58, IBBBBBBBBBBBBBBBBMM are derived from repeat units (for example, I, B, and M), when each polymerized to form a homopolymer block, having a

glass transition temperature above 40 °C (53°C, 105 °C, and 105°C for blocks IIIII, BBBBBB, and MMMMM, respectively). In contrast, at most only one of the at least one first block and the at least one second block of the instantly claimed block polymer has a glass transition temperature of over 40 °C.

As such, Anton differs from the current claims in, for example, that Anton does not teach or suggest the currently recited Tg ranges of the blocks; and Anton does not teach or suggest the intermediate segment is a random block, let alone the random block as currently recited, as amended. Further, as noted by the Office, Anton is silent on polydispersity index, and thus does not teach or suggest the polydispersity index as currently recited.

#### **Frechet**

Frechet describes "a cosmetic or personal care composition comprising a thermoplastic elastomer which is a block copolymer comprising a core polymer having a backbone comprising at least a proportion of C-C bonds and two or more flanking polymers". See col. 2, lines 55-59. Frechet also describes that "the core polymer may be linear or star-shaped". See col. 3, line 53. Frechet further teaches that "Tg of the flanking polymers will be higher than that of the core polymer", see col. 4, lines 35-36. Thus, for triblock ABA copolymers, which are the "preferred polymers for use in the present invention", see col. 10, lines 13-14, the intermediate block B has a Tg of less than that of the two blocks (A) linked together by B. In contrast, the currently claimed intermediate block, as amended, has a Tg "that ranges from the glass transition temperature of the first block to the glass transition temperature of the second block".

The Office appears to rely on Frechet for the teaching of a random block that can be put between the core block and the flanking block, wherein the core block and the flanking blocks have Tg ranges overlapping with the currently claimed Tg ranges for the first and second blocks. *See* Frechet at col. 4, lines 21-30. Frechet generally describes that the block polymers may have an architecture such as A-R-B-A or A-R-B-R-A, wherein R is a random block. However, Frechet is silent on the Tg of R, and further does not describe how to make such kinds of block polymers. Indeed, Frechet only describes how to make ABA triblock polymers, wherein both As are identical polymers. *See* Examples 1-60.

### **Melchioris**

Melchioris describes a copolymer P for the use in coating composition, wherein the ratio  $M_w/M_n$  (e.g. polydispersity index) varies from 2.5 to 4.0, and preferably from 3.0 to 4.0. *See* paragraph [0061]. Melchioris does not discuss whether the copolymer is a block polymer. Moreover, the copolymer is defined by a process, and is a mixture of copolymers which differ from each other by comprising different set of monomers, *see* paragraph [0062].

In support of combining Melchioris, the Office states that

Melchioris discloses copolymer compositions with the object of providing coating compositions with high resistance to solvents, water, and environmental influences with very good optical properties (gloss) and mechanical properties (hardness flexibility), which can be applied in a wide range of fields (paragraph [0013], and [0037]). Melchioris teaches that polydispersity values of 2.9-3.5 are acceptable to achieve the objects of the invention Table 1. Thus, the combined teachings of Anton, Frechet, and Melchioris render claims 75 and 76 obvious. Office Action at 8, paragraph 3.

However, the results of Table 1 and Table 2 of Melchioris show that the relationship between polydispersity index and those desired objects cannot be reasonably predicted. For example, the comparison examples 13 and 14 in Table 2 prepared by a process not disclosed by Melchioris, but with the polydispersity index (3.2) within the range of the one as disclosed by Melchioris, display, for example, either significantly lower solvent resistance, or unsuitable for storage, when compared with Melchioris' polymers. See paragraph [0127]. Further, Table 1 indicates that the comparison examples 5 and 8 display very different properties in terms of both viscosity drift, polydispersity index, and resistance to water, etc. Comparison examples 5 and 8 used polymer examples 6 and 9, respectively, wherein both polymer examples 6 and 9 contain same component monomers, but were prepared by different processes. It is thus clear to one of ordinary skill that the structure of a polymer, and hence the property thereof, depend on not only the component monomers, but also the requisite process used to prepare the polymer; and that the incorporation of the polydispersity index as described by Melchioris, and of some monomers as taught by Anton and Frechet would yield unpredictable results.

Thus, for the foregoing reasons, those three references, taken alone or in combination, do not render obvious the current claims, as amended. Applicants respectfully submit that this obviousness rejection is improper and should be withdrawn.

#### **IX. Double Patenting**

The Office maintains the double patenting rejections made in the previous Office Action.

In an attempt to advance prosecution of this application, Applicants submit

herewith Terminal Disclaimers rendering this rejection moot. Applicants respectfully request entry of the Terminal Disclaimer and withdrawal of this rejection.

**Conclusion**

In view of the foregoing amendments and remarks, Applicants respectfully request reconsideration and reexamination of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.





```
ERROR: stackunderflow
OFFENDING COMMAND: ~
STACK:
```